IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and the UNITED STATES OF AMERICA,

Appellees.

PETITION FOR REHEARING

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The principal reasons seeming to us to pervade the Court's opinion ordering dismissal of the appeal (not affirmance of the order of November 16 denying intervention and not affirmance of the findings and order of December 7) are: first, unwillingness of the Court to interpret Rule 24 so as to permit, as matter of right, what might be vexatious and dilatory interventions in anti-trust cases; and, second, so as to make appeals under the Expediting Act to this Court from refusals of intervention, if possible at all, sustainable only in very extreme cases. We have

these practical considerations in mind, but petition for a rehearing in the hope of showing as a complement:

(a) Rule 24 is to be liberally not narrowly construed; where as here the United States supports a proposed intervention and aid of the proposed intervenor for its special knowledge and interest, danger of vexatious interference and delay is slight and the advantage of full presentation of industrial and economic problems involved is great; in cases where an applicant's rights will be lost if he is not permitted to intervene, he should be permitted, under proper conditions, which the Court can easily require and control, to intervene;

(b) new, and from the course of the proceedings, to counsel wholly unexpected, procedure governing appeals under the Expediting Act from refusals of intervention should be established only after utmost exploration of consequences of the new procedural requirements, and if counsel are given opportunity to argue against the new procedure being applied in the pending appeal, or to supply additional parts of the record and furnish argument upon a completed record;

(c) there are certain assumptions in the Court's opinion which reargument would seek to disprove; and

(d) a result that an offender against the anti-trust laws should, by modification of a consent decree, acquire stock of a competing corporation in contravention of decisions of this Court is not desirable and should not eventuate owing to a procedural lacuna.

Hence, petition for rehearing is requested because the Court's opinion:

(1) assumes (mistakenly, we feel, with great respect, can be shown) that Allen [1] is not bound by the District Court's decree;

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[1] Allen Calculators, Inc., will be referred to as "Allen"; Allen-Wales Adding Machine Corporation as "Allen-Wales"; National Cash Register Company as "Cash."

(2) treats the application to intervene here involved as if the attempt had been (as it was not) to intervene while the original petition for injunction for violation of the anti-trust laws brought by the United States was pending—a very vital difference according to *United States* v. *Swift & Co.*, 286 U. S. 106;

(3) interprets Rule 24 as, in this particular instance, narrowing the grounds of permissible intervention;

(4) decides an appeal under the Expediting Act from an order refusing intervention taken or substantially taken before decree on the merits of petition for modification of a consent anti-trust decree, is taken from such latter decree; requires, to prevent affirmance, full printing of the record relating to such merits decree and affords no opportunity to appellant to supply the omission;

(5) permits lifting the injunction in an anti-trust decree so as to allow the offender to acquire stock of a competing company in contravention of law established by binding decisions of this Court.

(1) Requested reconsideration of statement in opinion Allen is not bound by decree.

As to (1), the opinion, after quoting Rule 24, says, in connection with paragraph (a) of that rule, relating to intervention of right (p. 3):

> "The application did not fall under (2) for the appellant clearly would not be bound by any judgment in the action."

But, in the first place, under Rule 24(a)(2) a proposed intervenor of right need not show it "would be bound by a judgment in the action," but only it "may be bound by a judgment in the action." In the second place, the opinion, besides summarizing Rule 24(a)(2) in a materially different respect from the way it reads, does not attempt to show why Allen is not bound by the judgment.

There is no factual refutation or showing of the inapplicability or incorrectness of numerous decisions of this Court that, when a court has entered a decree and reserved jurisdiction to modify the decree, no other court can or will attempt to assume jurisdiction respecting the same matter, either before or after modification. The law, we submit with deference, is invariably to the contrary of the Court's above statement that Allen is not bound by what has happened and the contrary is required by principles of comity, orderly procedure and to avoid unseemly conflicts of jurisdiction.[2] In the third place, Section 16 of the Clayton Act allows

> "Any person . . . corporation to . . . have injunctive relief . . . against threatened loss or damage by a violation of the anti-trust laws, . . ."[3]

Certainly,[4] it was not inappropriate for Allen to ask to intervene in opposition to the proceeding looking to the modification of a decree entered for its protection in the court which passed the decree. No one denies the court might have permitted Allen to intervene. Surely, then, it is not intended by the opinion to declare Allen may still have recourse under the decree of 1916 or under Section 16 in another United States Court, to make the United States and Cash parties to a new suit and enjoin what the court below has permitted. It is a practical certainty no other Court would tolerate such an attempt. Section 16 of the Clayton Act clearly allows injunctive relief only against "threatened loss," not loss that has resulted from an executed transaction. *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916).

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[2] As a recent example only, *Miller* v. *Court of Common Pleas of Cuyahoga County*, 143 O. S. 68, decided March 22, 1944.

[3] Cited more fully in brief of appellant opposing motion to dismiss or affirm, p. 8.

[4] Opinion, p. 3, beginning last paragraph.

So, if the Court adheres to its decision, Allen, we cannot help but feel, as to any rights under Section 16 of the Clayton Act or under the decree, not only "may be bound by a judgment," but "will be bound by a judgment in the action."

(2) Intervention below sought not in aid of or to oppose anti-trust injunction petition, but to oppose modification of consent decree granting injunction.

As to (2), the opinion (p. 3), referring to Section 16 of the Clayton Act, says:

> "It grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States."

But, the proceeding, in which Allen sought to intervene, was no longer a suit pending before judgment. The injunction suit had been brought and a final consent decree in favor of the United States had been entered in 1916. The suit had been merged in a judgment. Allen had no right to sue under Section 16 while that judgment was in effect, because all relief Allen could obtain under Section 16 had been gained for it by the United States. Intervention was sought by Allen to oppose a recent petition by Cash, the offending party, to modify the decree—an ancillary, but substantially a new proceeding by Cash. There is a most important difference between attempt to intervene in such a case and in an original proceeding by the United States. *United States* v. *Swift & Co.*, 286 U. S. 106, 119, says of the former:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . Nothing less than a clear show-

ing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

But, even if intervention had been sought before the original petition for injunction had proceeded to decree, the United States should pretty well know whether intervention would be helpful or likely to hamper enforcement of the anti-trust laws. Opposition of the Government would be entitled to great weight when intervention is discretionary. Likewise, if intervention is discretionary, the request of the United States as made here that intervention should be granted, should have been given almost conclusive weight by the trial court. It should at least have been considered, but it was not.

The effect of the Court's decision in this case appears to establish a precedent that intervention of a competitor is discretionary in a proceeding by the guilty party to obtain modification of a consent anti-trust decree against it, and opposition of the offender to intervention, although the United States desires it, may be allowed to prevail without applicant having possibility of appeal.

(3) The opinion interprets Rule 24 as restricting rather than amplifying previous law relating to interventions.

As to (3), before the Rules of Civil Procedure were adopted, the right of intervention in the federal courts was well established where refusal of intervention to an applicant, having a special interest to protect, would amount, as here, to a practical denial of relief to applicant. *United States* v. *California Canneries*, 279 U. S. 553, decided in 1929, before the Rules of Civil Procedure were adopted, is not to the contrary and surely not where the applicant "may be bound by a judgment in the action"

in which he is not allowed to intervene. (We are speaking now of right to intervene and not of appealability under the Expediting Act of refusal to intervene.) The language of the *Canneries* opinion was (p. 556), concerning the Court of Appeals:

> "It did not refer to the decisions which hold that an order denying leave to intervene is not appealable . . . except. . . ."

The ratio is that refusals of leave to intervene are ordinarily interlocutory orders because not preventing the applicant from having relief elsewhere. The cases cited in the *Canneries* opinion (p. 556) bear this out. Thus, in *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20 (8 Cir.), opinion by Sanborn, J., it is said (p. 30):

> "In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the court; another class in which . . . his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. The petitioner, who has a claim of the latter class, has an absolute right to intervene . . . , permission for him to intervene is not discretionary with the court, and he may review by appeal an order refusing that right."

citing decisions including *Credits Commutation Co.* v. *United States*, 177 U. S. 311.

We have urged that when the decree of 1916 forbade Cash to acquire stock of a competitor subject to right in Cash to petition for permission to acquire in a particular case, the stock of all competitors, *so far as relates to acquisition thereof by Cash*, was in the exclusive jurisdiction and, therefore, in the constructive custody of the court

passing the decree. The Court has disallowed that contention and we do not purpose attempting to re-argue it. However, we make the point that intervention of right was permitted in cases relating to a *res*, not because they were *res* cases, but because the rights of the proposed intervenor would be lost in that class of cases, as an example, if the intervenor were not permitted to come in and assert its right in the court having custody, actual or constructive, of the *res*. The basis of allowance of intervention of right is that it exists wherever the proposed intervenor's claim will be lost if intervention is refused. If we are correct in thinking Allen's right to prevent acquisition is now lost, then intervention would have been as of right in the only court that could have saved Allen's rights.

In *Credits Commutation Co.* v. *United States, supra*, the opinion quotes (pp. 315-16) from and approves another opinion of Judge Sanborn, as follows:

> "When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, *but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.* Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. . . . It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. . . . In such cases an order denying leave to intervene is not discretionary . . . , and will generally furnish the basis for an appeal, *since it finally disposes of the intervenor's claim by denying him all right to relief.*" (Italics ours.)

This quotation shows that fund in court cases are illustrative, not exclusive of the instances in which intervention is a matter of right and the real test is: whether the proposed intervenor's rights will be lost if he is not allowed to intervene. In *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, 316 (1923), the opinion, after citing *Credits Commutation Co.* v. *United States* and other decisions, adds (p. 317):

> "These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

What was really decided in *United States* v. *California Canneries, supra,* was, under the Expediting Act, there was no appeal to the Court of Appeals from refusal of intervention. Yet the only appeal taken was to that court: when it was decided appeal had been to the wrong court, that ended the matter. Another ground for disposing of the case was that the intervention was sought but not allowed "for the purpose of impeaching a decree already made," citing numerous cases. The opinion did not decide that if one is entitled to intervene of right or there is abuse of discretion, denying leave to intervene is not a final decree as to the applicant. This is manifest from *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, of which this Court in the present opinion says, in effect, that when the proposed intervenor there was entitled to intervene as of right and was denied intervention "the action was final" (p. 3). As this Court entertained the appeal in that case, it must have been on the proposition that refusal of intervention even in a non-*res* case may be a final order. In *Chrysler Corp.* v. *United States,* 316 U. S. 556, also decided after *Credits Commutation Co.* v. *United States,* modification of a consent anti-trust decree was regarded (p. 562), citing the Expediting Statutes,

as a final, appealable order. The "final decree" in the Expediting Act is no different from the "final decision" in the statute relating to appeals to a Circuit Court of Appeals. (Jud. Code, Sec. 128, *Reeves* v. *Beardall,* 316 U. S. 283.)

(4) New procedure prescribed by opinion under Expediting Act in appeals from refusal of intervention.

As to (4), the last paragraph of the opinion (p. 4) indicates that the appeal here, although sought from the order of November 16 refusing intervention, was really from the findings and order allowing acquisition entered December 7 (R. 17) and must be dismissed, since not enough of the record is printed to show abuse of discretion in entering such findings and order.

In taking the appeal from the order of November 16 refusing intervention, Allen thought it was employing customary and required procedure. Allen followed *Missouri-Kansas Pipe Line Co.* v. *United States, supra,* where the appeal was from the refusal of leave to intervene. Allen's petition for appeal was filed December 4. The assignments of error filed with it (R. 23-4) on December 4, assigned error only regarding the order of November 16 as refusing and withdrawing leave to intervene and refusing to enter in that order the reason for refusal. The jurisdictional statement also filed December 4 did not and could not refer to any prospective findings and order. Allen, when it took its appeal so far as it could on December 4, did not know any findings or order were to be entered, much less when, or what they might contain.

Rule 72 of the Rules of Civil Procedure, relating to appeal from the District Court to this Court, reads:

> "When an appeal is permitted by law from a district court . . . , an appeal shall be taken by petition for appeal accompanied by an assignment of errors.

> The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

Before this rule was adopted, an appeal was "taken" before bond was given and a citation was unnecessary when appeal was taken in open court at the same term decree was rendered. *Brown* v. *McConnell,* 124 U. S. 489.

If the present appeal was not "taken" under this Rule by filing on December 4 petition for appeal, assignment of errors and jurisdictional statement, and something further remained to complete the appeal, that was not because of Allen's wish to defer complete appeal, but because the Court requested postponement to December 6 and again on that date to December 10. The jurisdictional statement contained in the printed pamphlet, "Statement As To Jurisdiction" (p. 1h), shows:

> "The petition for appeal was filed on December 4, 1943, and is presented to the District Court herewith, to-wit, on the 4th day of December, 1943."

and the Supplemental Jurisdictional Statement filed December 10 shows (id. p. 13):

> "On presentation to the Court by Allen Calculators, Inc. on December 6, 1943, of its appeal papers filed December 4, 1943, and of a form of bond for costs on appeal, presentation of same having been postponed to that date at the request of the Court, and counsel for Allen Calculators, Inc. having requested the Court to fix the penalty of said bond for costs in a sum approximately two hundred and fifty dollars ($250.00), the Court continued the hearing of the petition for appeal until December 10, 1943."

The reason for Allen printing the findings and order of December 7, 1943, as an Appendix B of its supplemental jurisdictional statement was not to undertake an appeal therefrom, but to show what had happened since it had appealed, as far as possible, on December 4 and 6 and to forestall motion to dismiss or affirm (later actually made) on the ground the case had become moot. The findings and order of December 7 had nothing to do, in Allen's opinion, with the extent or validity of its appeal either taken on December 4; or at least taken as far as it was possible to take the appeal on that date and on December 6. If the Court, following appeal from refusal of leave to intervene, had denied Cash's petition, that would not have invalidated Allen's previous appeal from the order of November 16 denying intervention. Allen's appeal would have been dismissed by this Court, not because a valid appeal from the order refusing intervention was dependent on or related to a later decree, but because the appeal, conceding it to have been well taken, had become moot. As we understand it, when a case becomes moot, the original appeal is not rendered faulty; it is assumed to have been well taken; but the dismissal is because the Court does not decide a controversy that has become only academic. If Allen had taken a perfectly good appeal and the case had later become moot, its appeal would have been dismissed. But the appeal would not be invalidated by the later order or event rendering the case moot.

The statement by appellant of points (R. 106) includes:

> "IV. The Case Is Not Moot."

Rule 75(d) of the Rules of Civil Procedure requires a statement of points:

> "If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action. . . ."

Allen, in its appeal, sought to comply fully with all applicable rules and particularly with Rule 75(e):

> "RECORD TO BE ABBREVIATED. All matter not essential to the decision of the questions presented by the appeal shall be omitted. . . . For any infraction of this rule . . . the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties."

The Court's opinion, p. 4, says that an appeal under the Expediting Act from a refusal of intervention to oppose modification, requested by the offender, of an anti-trust consent decree, must be treated as taken from the final later decree on the merits of the petition for modification. With the greatest deference, we ask the Court to reconsider this pronouncement and submit, as one reason, that under previous decisions of the Court no one may appeal from a decree entered in a cause in which he is not a party. *Ex Parte Leaf Tobacco Board of Trade* v. *City of New York*, 222 U. S. 578, 581:

> "1. One who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard* v. *Lombard*, 9 How. 530; *Indiana* v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex parte Cockroft*, 104 U. S. 578."

We respectfully ask the Court to allow Allen further argument in an effort to convince the Court that the present decision introduces new and onerous conditions respecting appeals from denials of intervention. The Court does not mean, we feel confident, to indicate that there cannot be an appeal, where intervention is a matter of right, or even where there is an abuse of discretion, because of the Expediting Act. Accordingly, if the Court's opinion is ad-

hered to, appellants will have the large burden and expense of submitting, and the Court the added labor of examining, entire, often voluminous records in cases where intervention has been refused. Practitioners, out of abundant caution, when appealing in any case from refusals of leave to intervene, will often print the entire record of all proceedings in the case.

In this appeal, everything relating to the application to intervene, the tentative allowance of intervention, the final denial of intervention and the refusal to enter a decree showing that the sole ground for refusing intervention was due only to a mistaken view of the law are included in the record, are printed and are before the Court. There is not a speck of anything relating to these matters below which opponents can point out is not before the Court.

The opinion concludes (last par. p. 4), treating the appeal as from the decree on the merits of Cash's petition for modification, that the Court would

> "have to affirm the judgment" (not dismiss the appeal) "since it is not shown that the District Court abused its discretion in denying intervention."

But, may we not still ask the Court to reconsider if, on this record, abuse of discretion or the equivalent plain error of law does not appear, when a trial court:

(1) refuses intervention solely because of a mistaken view of the law that none but the original parties in a suit can become parties, when the offender against whom there is a consent decree, petitions for relief from the decree, and the other party, the United States, supports, as helpful, the application to intervene of a competitor protected by the decree and having special knowledge of the problems involved;

(2) grants conditional intervention, promises opportunity for citation of authorities and, without hearing these

authorities and in spite of them, revokes the allowance of tentative intervention for no reason except such mistaken view of the law;

(3) if the matter is discretionary, does not, as required by Rule 24(b), last sentence:

> "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

particularly when the United States says it will not. As stated in *Carbide & Carbon Chemicals Corp.* v. *United States Industrial Chemicals, Inc.*, 140 Fed. 2nd 47, 50 (4 Cir.), discretion " 'is a judicial discretion and must find its basis in good reason' and is subject to appellate review in proper cases."

However, all this aside, and assuming, as this Court does, Allen's appeal is to be treated as taken from the findings and order of December 7, error in that order requiring reversal clearly appears from the record here. Section 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, Sec. 18), forbids a corporation to acquire stock of another corporation

> "where the effect of such acquisition may be" (not "is") "to substantially lessen competition"

between the buyer and seller; or will

> "tend to create" (not necessarily "creates") "a monopoly of any line of commerce."

There is no finding in the order of December 7 that the acquisition by Cash of Allen-Wales "may not substantially lessen competition" in the future or will not "tend to create a monopoly". The record is replete with instances where counsel for Cash pressed on the Court and the Court adopted, the erroneous view, suppression of present sub-

stantial competition would be the only cause for a denial of the petition. This is all the more plainly erroneous when the record shows, without dispute, that the competition between Cash and Allen-Wales in respect to cash drawers and registers had just begun and Allen-Wales's potential competition was great.

Findings 1 to 8 (R. 18-19) certainly do not support the decree or satisfy the requirements of *United States* v. *Swift & Co.*, 286 U. S. 106, as to what must appear in order to justify modification of consent decrees in anti-trust cases on petition of the offender. Thus, there is no finding of the *Swift* case requisites (pp. 117-119):

(a) That Cash's overwhelming size, past aggressions and oppressive monopoly which existed in 1916 do not still exist. (No such finding could be made because the record shows Cash's present enormous size and substantial monopoly of the field.)

> ("The inquiry for us is whether the changes are so important that dangers, once substantial, have become attentuated to a shadow." p. 119)

(b) That it would be a grievous wrong to Cash not to permit acquisition. (Here, again, no such finding could possibly have been made, because this is not pleaded by Cash in its petition and the utmost that was ever suggested for Cash in support of its petition for leave to acquire was that acquisition would be a convenience. It was not even suggested acquisition was a necessity or that refusal of permission to acquire would be a grievous hardship.)

(c) That there must be a "clear showing" of (a) and (b).

Where the findings in a decree are deficient as not including essential elements and are insufficient in law to support what is ordered and, on the contrary, show that, according to decisions of this Court, such as *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356-7;

United States v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 224; *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466, the exact opposite should have been ordered, and enough appears from the record to show that the beneficiary of the decree could not and made no effort to show by evidence, clear or otherwise, matters necessary for essential findings if the order is to be sustained (namely, decrease of size and monopoly and grievous wrong from refusal of its application), printing the whole record would not high light the already glaring error apparent from the findings and order in the failure of the findings, as matter of law, to justify the order.

The opinion says (p. 4):

> "The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record."

Assuming, as the Court does, the whole record on Cash's petition should have been brought to this Court, the appeal, we suggest, need not be dismissed. Suppose it had been decided Allen was entitled to intervene as matter of right and yet intervention had been refused. We do not understand that an appeal could not have been taken under the Expediting Act, or that it would have been necessary, in order to secure reversal, to include more of the record than clearly showed the right and the denial of it. Must one then judge, at his peril, regarding the "refinements," *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, 458, of whether an intervention is of right or permissive under Rule 24? That case (p. 459) held Rule 24(2):

> "plainly dispenses with any requirements that the intervenor shall have a direct or pecuniary interest in the subject of the litigation."

This Court has the power, instead of directing the appeal be dismissed, to require that the whole record, thought by it to be revelant, be certified and sent to it, so it may determine whether the issues were thoroughly explored and the parties were adequately represented. Even if they were, there might still have been an abuse of discretion.

If the Court, on consideration of what we are suggesting in this petition, is still of opinion the whole record should be produced, Allen, we think, should be given opportunity (because we know of no opinion of this Court putting Allen on notice that the failure to print the entire record was inexcusable) to assume the labor and expense of printing what the Court thinks should be supplied.

We feel bound to asseverate, however, the data presented to the court below were meager and did not comprehend the real issue before it. The data, presented almost entirely by Cash through charts prepared by it and its own witnesses,[5] were confined to showing no substantial direct competition between Cash and Allen-Wales. While the data had apparently been submitted to the Government for checking, no adequate check was made by persons familiar with the facts and figures. This is apparent when inaccuracies in these figures were called to the attention of the court by Allen and went uncorrected because it was not allowed to intervene (R. 36b, 35). It is not much comfort that the president of Allen was permitted to testify, when his own counsel was not permitted to question him and develop matters set forth in the proposed answer attached to the intervening petition. Among these bearing on the real issue which would have been brought out by Mr. Allen through questioning of his counsel are:

(1) The basic principles underlying the cash register, the adding machine and other similar registering devices are substantially the same, and the mechanical concept and

[5] Supplemented by salesmen demonstrations of machines, not in the record, at all.

engineering required for these types of machines are measurably interchangeable, so that there was no purpose in permitting Cash to acquire an adding machine company for the purpose of supplementing its line. (See paragraphs 3 and 4 of intervenor's proposed answer. R. 56-7.)

(2) Cash still exercises predominant control in the registering device field, and nothing has happened to break its throttle-hold. (See paragraph 5 of intervenor's proposed answer. R. 57.)

(3) It is only by virtue of building strength without interference from Cash, in lines such as adding machines, that other manufacturers have been able gradually to attempt to shift into the cash register field dominated by Cash. This shift has been necessarily gradual, because, in the first place, the independents have had to build competitive strength in the way of financial condition, and in the way of distributive outlets before they could venture into direct competition with Cash on cash registers. It is exactly in that way that the independents have been able to develop and put on the market the cash drawer combination which has had a very appreciable success although only recently put on the market. Cash not only directly adds to its monopoly by taking away the cash drawer business developed by Allen-Wales, but indirectly fortifies its monopolistic position by eliminating a substantial part of the adding machine business which is the means by which independents have been enabled to build up strength with which to compete with Cash in the cash register field. (See paragraphs 8 through 13 of intervenor's proposed answer. R. 59-60.)

(4) The effect upon the dealer organization of permitting Cash to take over Allen-Wales is not limited to the direct result of this acquisition upon the dealers themselves, but embraces also the serious results to those independent

manufacturers in the registering device field, who must depend upon dealer organization not only for the sale of products now manufactured, but also for the sale of cash registers on any basis competitive with that of Cash While this was presented in an informal way by the Government from the standpoint of the dealers, there was no presentation of its effect upon the independent manufacturers who are the only actual or potential competitors of Cash in the registering device field.

The order of December 7, while it purports to give some measure of protection to the dealers, utterly fails to protect the independent manufacturer in connection with dealer distribution. In fact, all the order purports to do is give Allen-Wales dealers a short breathing space in which they can turn to some other line of business, and even with respect to this short space, the protection is very insecure. (Paragraphs 14 through 21 of intervenor's proposed answer. R. 61-63.)

Although all the above matters were set forth in intervenor's proposed answer and all were important on the real issue before the court, no data or evidence was presented concerning these matters by Cash or the Government, and Allen was denied the right to present evidence or data because not permitted to intervene. Therefore, we ask a reconsideration of that part of the opinion which (p. 4) says the issues properly before the court were thoroughly explored. The court went into the case on a very narrow basis and on an erroneous view of the law, and even with respect to that basis available data and evidence were inadequately presented.

Not only was there failure to permit production of all available data upon the issues of the case, but there was a failure to permit adequate representation by those parties who had a direct interest in the matter before the court.

If we assume that the Government took an adversary position in the proceeding (as the opinion requires, contrary to our previous thought), the Government did not take up the cudgels for the independent manufacturer. That it was not doing so and did not intend to do so is fully apparent not only from the record itself, but also from its having invited intervention by Allen to present the facts to the court from the standpoint of its interest in the proceeding and that it did not appeal. Even before Mr. Allen was called to the stand, the Government had clearly indicated it preferred to have him examined by his own counsel and would only call him as a witness as a last resort in case the court refused to permit Mr. Allen to be so examined. (R. 40 top.)

Furthermore, although the Government did talk up for the dealers and present some data with respect to their situation in an informal manner, the purported representation of this group by the Government failed completely, as can be demonstrated from a reading of the order of December 7, 1943, and the provisions of that order designed to protect the dealers. Although the court found (paragraph 7 of the order R. 19 top) that the preservation of the independent dealers as competitors in the field of distribution of business machines is a matter of public interest, it then went ahead and made an order which, in effect, gives them only a five-year lease of life. This was done without a showing by the Government, or any representative of the dealers of the effect such an order would have on the continued existence of these dealers. In the absence of some showing, the only conclusion that can be drawn from the order itself is that the existence of the Allen-Wales dealers will at best be short-lived, and that instead of being preserved as actual and potential distributors, they are in fact being destroyed by order of the court and under guise of its protection. Both of the premises

upon which the opinion bases its conclusion fail, we most respectfully submit, because there was neither full exploration of the issues nor adequate representation of the persons whose interests were directly affected by the order to be made.

It would seem that in any case where the interests of certain groups of the public are involved and the Government does not assume to have the facilities or facts necessary to represent these interests fully, the intervention by one representative of each of these groups, such as the grocers' association in the *Swift* case, especially if requested by the Government, should be permitted as matter of sound policy and discretion. That would not lead to mob intervention. In fact, the same situation occurs for example, frequently in reorganizations under Chapter X of the Bankruptcy Act, where the court permits the intervention of committees or other representatives of various groups of creditors although the interests of all creditors are also represented by the bankruptcy trustees and the Securities and Exchange Commission; but if more than a representative of a group seeks to intervene, the court has frequently denied such second application on the ground that the group is already adequately represented. It would seem the same practice ought to be adopted in anti-trust cases, and where no group has any representative to present the facts from the standpoint of that group, it ought to be abuse of discretion not to allow one representative to intervene and be fully heard.

(5) Unfortunate result if erroneous modification and permitted acquisition are sanctioned.

According to *United States* v. *Swift & Co.*, 286 U. S. 106, and subsequent decisions, *supra*, pp. 16-17, and Section 7 of the Clayton Act, *supra*, p. 15, the petition of Cash to lift the injunction against it in the consent anti-trust decree

of 1916 so as to permit acquisition of the stock of Allen-Wales, a growing competitor, should have been denied. But, if the opinion of this Court is adhered to, the error becomes irretrievable: the Government has not appealed and Allen cannot. If the decision below is wrong in law and prejudicially erroneous, a result of permitting it to stand because of procedural insufficiencies should be reached only because unavoidable.

> "Rules of Practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel* v. *Helvering, Commissioner*, 312 U. S. 552, 557.

If the Court will re-read this record, it will find no reference to the *Swift* case except a breathless reference to it solely as authority for permitting intervention (R. 33) by counsel for Allen. Such counsel had no further opportunity to refer to the case. Its binding authority prescribing requisites for modification of consent anti-trust decrees was not adverted to by anyone. The full argument for the Government appears in the record (R. 85-104). The admonitions of the *Swift* case that a consent anti-trust decree is not to be modified at the instance of the offender except upon its clearly satisfying certain conditions precedent, were not presented to the trial court. They did not enter into the Court's consideration of the petition. Certainly, counsel for Cash did not plead, advert to or seek to meet the conditions of the *Swift* case. They repeated, time and again, the sole issue was whether there was substantial competition between Allen-Wales and Cash, as if this were an original proceeding having no relation to the previous consent decree. The Court accepted this and thought the whole matter governed by *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291 [(R. 89), and other interpellations by the Court during

argument for United States (R. 85-104)], which had nothing to do with modification of a consent decree.

The right to intervene is valuable, not alone to present the applicant's position to the trial court, and not alone so applicant may cross examine, within reason, the party seeking relief which applicant opposes, but also for appeal from an erroneous decree when the parties to the suit do not choose to appeal, no matter how wrong in law the decree may be. Of the suggestion there may be vexatious and dilatory appeals, it may be observed the sixty day limitation, the motion to dismiss or affirm, the summary docket and the power to advance and to assess costs, where appeals are frivolous, are ready deterrents. The counter disadvantage of an erroneous decree being allowed to stand, in a matter of public importance, because the parties do not choose to appeal, weighs heavily in favor of permitting and controlling intervenor's appeals to redress a public wrong, if the matter of appeal is at all open.

We have tried to follow Rule 33 and to make this petition for rehearing as brief and distinct as adequate statement of grounds permits.

Respectfully submitted,

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Counsel for Petitioner,
Allen Calculators, Inc.

We, Murray Seasongood and Frank R. Bruce, counsel for Petitioner, Allen Calculators, Inc., certify that the above petition for rehearing is presented in good faith and not for delay.

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 592.—October Term, 1943.

Allen Calculators, Inc., Appellant, *vs.* The National Cash Register Co. and the United States of America.	Appeal from the District Court of the United States for the Southern District of Ohio.

[May 1, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

By a decree, entered February 1, 1916, in a suit by the United States against National Cash Register Company, the latter was restrained, pursuant to the antitrust statutes, from acquiring ownership or control of the business or plant of a competitor manufacturing or selling cash registers or other registering devices. The injunction, however, provided that, in case National should desire such acquisition,

"a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

National, desiring to acquire stock of Allen-Wales Adding Machine Corporation, petitioned for leave and gave the required notice to the Attorney General. The Government filed an answer opposing the grant. The matter was set for hearing in the District Court November 15, 1943. On that day Allen Calculators, Inc., the appellant, presented a motion for leave to intervene. The United States consented to the proposed intervention; National opposed it. The District Judge granted intervention conditionally and allowed counsel for the appellant to make an opening statement and to take some part in the proceedings. Subsequently, but prior to the closing of the hearing, he ruled

that the appellant would not be allowed to intervene. Before making his ruling, he was advised, in answer to his inquiry, that the president of the appellant would be called as a witness by the Government. November 16 he entered a formal order denying intervention.

The issues, which were tried upon evidence submitted by National and by the Government, were whether the purported acquisition would eliminate competition between certain products of National and Allen-Wales, would eliminate potential competition between other products of the two companies, and would, in other respects, be contrary to the purpose of the original decree. The proceeding was adversary throughout.

December 4 the appellant filed its petition for appeal from the order denying intervention. December 7 the District Judge entered findings of fact and an order granting National's petition upon certain conditions which he deemed necessary to insure compliance with the original decree in the suit. Neither party has appealed from that order. December 10 the Judge allowed this appeal with a proviso that allowance should not operate as a stay of the order granting National's petition. The appeal is to this court under the Expediting Act.[1]

Rule 24 of the Rules of Civil Procedure[2] is:

"(a) *Intervention of Right.*—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

"(b) *Permissive Intervention.*—Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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[1] Act of Feb. 11, 1903, c. 544, § 2, 32 Stat. 823, as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167, 15 U. S. C. § 29. Cf. Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. § 345.

[2] 28 U. S. C. A., following § 723c.

The appellant insists that it was entitled to intervene as of right, but we think that, in the light of the express provisions of clause (a) the contention must be rejected. No statute of the United States confers an unconditional right of intervention, as required by (1). The appellant relies on § 16 of the Clayton Act,[3] but that section merely authorizes private parties to sue for relief against threatened damage consequent upon the violation of the antitrust laws. It grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States. The application did not fall under (2) for the appellant clearly would not be bound by any judgment in the action. Nor had it any interest in the distribution or disposition of property in the custody of the court so as to come under (3).

The appellant relies upon *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. Clearly, as to the intervenor, the action was final. We accordingly entertained the appeal.

The appellant had standing to invoke the discretion of the district judge to permit it to intervene under (b)(2) on the ground that its "claim or defense and the main action have a question of law or fact in common." The rule provides that, in exercising discretion as to intervention of this character, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court. The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues.

[3] 15 U. S. C. § 26.

The challenged order is but an order in the cause and not the final judgment. The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record. If, in this case, National's petition had ultimately been dismissed, a review of the court's denial of appellant's intervention would have been an idle gesture. Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed. It was, *inter alia*, to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.[4]

The record shows that the District Court had entered a final decree on the merits of National's petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act,[5] and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since it is not shown that the District Court abused its discretion in denying intervention.[6]

The appeal is dismissed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY dissent.

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[4] United States v. California Canneries, 279 U. S. 553.

[5] United States v. California Canneries, *supra*.

[6] *Id.*, cases cited p. 556.